KK Oriental Builder Sdn Bhd v Merchant Synergy Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22C-46–10 OF 2020
SUMATHI MURUGIAH JC
5 DECEMBER 2023

Contract — Building contract — Claim for work done — Whether plaintiff had proven its claim on balance of probabilities — Whether defendant failed to establish its counterclaim

In this action, the plaintiff claimed payment of RM1,953,931.99 from the defendant being the amount allegedly remaining unpaid under a contract to build 52 bungalow houses. The plaintiff claimed the defendant failed to respond to notices for payment of the said sum despite being fully aware of how the amount was derived. The plaintiff said that it had fully completed the construction of 34 bungalows under the first two phases of the building contract whilst the construction of the remaining 18 bungalows in the last two phases could not be fully completed because it was directed to stop work by the local authority in compliance with the Movement Control Order ('MCO') when the Covid-19 pandemic was rife between mid-March 2020 until the end of December 2021. The plaintiff said it informed the defendant about the stop work order and asked for extension of time to complete the construction, but the defendant kept mum and finally appointed a third party contractor to complete the construction from where the plaintiff had left off. The plaintiff contended that it was not guilty of any delay in completion of the project. In its defence and counterclaim, the defendant, inter alia, contended that the plaintiff's construction was riddled with defects and that the defendant had spent about RM432,171.32 to rectify them. The defendant also claimed for liquidated and ascertain damages ('LAD') amounting to RM783,200 and sought a declaration/order that the certificate of practical completion ('CPC') issued in respect of the first two phases of the project be cancelled and declared invalid on account of the alleged defects in construction.

Held, allowing the plaintiff's claim as prayed for and dismissing the defendant's counterclaim:

(1) The defendant's admission in its pleadings that the CPC had been issued by the architect for the first two phases of the building contract established that the plaintiff had completed the works under those phases. As for the works under the last two phases, the plaintiff did not claim that it had completed the houses and had computed its progressive

claims up to the time it had to stop construction due to the stop-work order issued in connection with the MCO (see paras 39–40). A

(2) The defendant claimed that the plaintiff had abandoned the construction works under the last two phases. But the plaintiff had shown to the court its letter to the defendant informing it that the plaintiff was required to stop work due to the MCO. The plaintiff had asked for an extension of time but the defendant did not respond to the request, thereby setting time at large. There was no evidence to show that the defendant had written to the plaintiff instructing it to resume work failing which the defendant would appoint a third party contractor to complete the works under the last two phases. It was an admitted fact that the defendant appointed the third party contractor without giving any notice to the plaintiff. Therefore, the defendant's contention that the plaintiff had abandoned the works was not established. For those reasons, the plaintiff was entitled to be paid for work done on the last two phases on a quantum meruit basis (see paras 40–44). B C D

(3) Although the defendant had prayed for the CPC to be cancelled, the CPC was never produced to the court. The plaintiff argued that if the CPC was produced, it would show that the bungalows in the first two phases had been completed. The court invoked s 114(g) of the Evidence Act 1950 against the defendant for non-production of the CPC to raise the presumption that if the CPC had been produced, it would be unfavourable to the defendant's case (see paras 46–48). E F

(4) The fact that the certificate of completion and compliance ('CCC') had been issued for the houses under the first phase coupled with the evidence of SP2 proved that any alleged defects in the first two phases had already been rectified by the plaintiff. The defendant's allegations of defects in the plaintiff's construction were very unclear. The photographs of alleged defects tendered by the defendant were not conclusive and were not admissible in evidence under s 73A of the Evidence Act 1950. The defendant had failed to give cogent, comprehensive and reliable evidence to prove the existence of defects in the plaintiff's work (see paras 51–56). G H

(5) It had been proven that the defects, if any, on the units under the first two phases had been rectified by the plaintiff prior to the issuance of the CCC. The defects, if any, in respect of the last two phases were not informed to the plaintiff as soon as the stop-work was effected and no joint inspection was conducted prior to the engagement of the third party contractor to continue where the plaintiff had left off. Therefore, there was no evidence to show that there were defects in the last two phases of the contract prior to the third party contractor taking over the construction of the same. There was also no evidence to show the I

defendant's objection or clarification or even request for a joint inspection to be done to verify the claims made against the work done by the plaintiff (see paras 57–58).

(6) The defendant had failed to prove its claim for liquidated and ascertained damages (see para 61).

[Bahasa Malaysia summary

Dalam tindakan ini, plaintif menuntut bayaran sebanyak RM1,953,931.99 daripada defendan untuk jumlah yang masih belum dibayar menurut kontrak pembinaan 52 buah rumah banglo. Plaintif menghujahkan bahawa defendan gagal memberikan maklum balas terhadap notis-notis pembayaran jumlah berkenaan walaupun mengetahui sepenuhnya jumlah wang diperoleh. Plaintif berkata, pihaknya telah menyiapkan sepenuhnya pembinaan 34 buah rumah banglo di bawah dua fasa pertama kontrak pembinaan manakala pembinaan baki 18 buah rumah banglo dalam dua fasa terakhir tidak dapat disiapkan sepenuhnya kerana pembinaannya diarahkan berhenti oleh PBT kerana Perintah Kawalan Pergerakan ('PKP') ketika pandemik Covid-19 melanda antara pertengahan Mac 2020 hingga akhir Disember 2021. Plaintif berkata, pihaknya telah memaklumkan kepada defendan mengenai perintah henti kerja tersebut dan meminta lanjutan masa untuk menyiapkan pembinaan itu, namun defendan terus melantik kontraktor pihak ketiga untuk menyiapkan pembinaan itu. Plaintif menghujahkan bahawa mereka tidak bersalah atas sebarang kelewatan penyempurnaan projek itu. Dalam pembelaan dan tuntutan balasnya, defendan, antara lain, menghujahkan bahawa pembinaan itu mempunyai kecacatan dan defendan telah membelanjakan lebih kurang RM432,171.32 untuk membetulkannya. Defendan juga menuntut ganti rugi jumlah tertentu dan dipastikan ('LAD') yang berjumlah sebanyak RM783,200 dan memohon perisytiharan/perintah bahawa sijil perakuan siap ('SPS') yang dikeluarkan kepada dua fasa pertama projek itu dibatalkan dan diisytiharkan tidak sah kerana dikatakan berlaku kecacatan di dalam pembinaan tersebut.

Diputuskan, membenarkan tuntutan plaintif seperti yang dipohon dan menolak tuntutan balas defendan:

(1) Pengakuan defendan dalam plidingnya bahawa SPS telah dikeluarkan oleh arkitek untuk dua fasa pertama kontrak pembinaan itu membuktikan bahawa plaintif telah menyiapkan kerja-kerja menurut fasa-fasa tersebut. Bagi kerja-kerja dua fasa terakhir, plaintif tidak menyatakan mereka telah menyempurnakan rumah-rumah itu dan telah mengira tuntutan progresifnya sehingga masa pembinaan itu dihentikan kerana perintah henti kerja semasa PKP (lihat perenggan 39–40).

(2) Defendan menghujahkan bahawa plaintif telah meninggalkan kerja-kerja pembinaan di bawah dua fasa terakhir. Walau bagaimanapun, plaintif telah mengemukakan kepada mahkamah suratnya kepada

defendan yang memaklumkan bahawa plaintif diperintahkan berhenti kerja kerana PKP. Plaintif telah meminta lanjutan masa tetapi defendan tidak menjawab permintaan itu dan menetapkan tempoh masa secara keseluruhan. Tiada keterangan yang menunjukkan bahawa defendan telah menulis surat kepada plaintif yang mengarahkannya untuk meneruskan kerja-kerja yang terhenti di mana defendan akan melantik kontraktor pihak ketiga untuk menyiapkan kerja-kerja di bawah dua fasa terakhir. Fakta itu diakui defendan bahawa mereka melantik kontraktor pihak ketiga tanpa memberi sebarang notis kepada plaintif. Oleh itu, hujahan defendan bahawa plaintif telah meninggalkan kerja-kerja itu tidak boleh dipertahankan. Atas sebab-sebab itu, plaintif berhak dibayar untuk kerja yang dilakukan pada dua fasa terakhir secara kuantum meruit (lihat perenggan 40–44).

(3) Walaupun defendan memohon agar SPS dibatalkan, SPS tersebut tidak pernah dikemukakan kepada mahkamah. Plaintif berhujah bahawa sekiranya SPS dikemukakan, ianya akan menunjukkan bahawa rumah-rumah banglo dalam dua fasa pertama telah siap. Mahkamah menggunakan s 114(g) Akta Keterangan 1950 terhadap defendan kerana tidak mengemukakan SPS tersebut untuk menimbulkan anggapan bahawa sekiranya SPS telah dikemukakan, ianya tidak membantu kes defendan (lihat perenggan 46–48).

(4) Fakta bahawa CCC telah dikeluarkan untuk rumah-rumah di bawah fasa pertama ditambah dengan keterangan SP2 menunjukkan bahawa kecacatan di dalam dua fasa pertama telah diperbetulkan oleh plaintif. Hujahan defendan mengenai kecacatan dalam pembinaan plaintif adalah sangat tidak jelas. Gambar-gambar kecacatan yang dikemukakan oleh defendan tidak konklusif dan tidak boleh diterima menurut keterangan di bawah s 73A Akta Keterangan 1950. Defendan telah gagal memberikan keterangan yang kukuh, menyeluruh dan boleh dipercayai untuk membuktikan wujudnya kecacatan dalam kerja plaintif (lihat perenggan 51–56).

(5) Adalah dibuktikan bahawa kecacatan-kecacatan itu, jika ada, pada unit-unit di bawah dua fasa pertama telah diperbetulkan oleh plaintif sebelum pengeluaran CCC. Kecacatan-kecacatan itu, jika ada, adalah pada dua fasa terakhir tidak dimaklumkan kepada plaintif sebaik sahaja perintah kerja henti diberikan dan tiada pemeriksaan bersama dijalankan sebelum penglibatan kontraktor pihak ketiga untuk pembinaan plaintif setakat mana ianya telah berhenti. Oleh itu, tiada keterangan yang menunjukkan bahawa terdapat kecacatan dalam dua fasa terakhir kontrak sebelum kontraktor pihak ketiga mengambil alih pembinaan itu. Tiada keterangan yang menunjukkan bantahan atau penjelasan defendan atau meminta pemeriksaan bersama dilakukan untuk mengesahkan

tuntutan berkenaan kerja-kerja yang dilakukan oleh plaintif (lihat perenggan 57–58).

(6) Defendan telah gagal membuktikan tuntutannya untuk ganti rugi jumlah tertentu dan dipastikan (lihat perenggan 61).]

Cases referred to

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Evidence Act 1950 ss 73A(6), 106, 114(g)

Ramdas Tikamdas (with Ashokvijay J Sanghrajka) (Sanghrajka & Assoc) for the plaintiff.

Jasvinjit Singh s/o Gurcharan (Au & Jasvinjit) for the defendant.

Sumathi Murugiah JC:

INTRODUCTION

[1] This suit was filed by the plaintiff against the defendant due to the non-payment of the balance contract sums for the construction of bungalow units on bungalow lots by the plaintiff. The construction of these bungalow units was based on a building contract entered into by the defendant with the owners of the bungalow lots at Bandar Akademia, Seremban.

[2] The plaintiff was engaged by the defendant to construct 52 bungalow units as per the specification of the building contract through four letters of awards issued by the defendant.

BACKGROUND FACTS

[3] The defendant had awarded the plaintiff four letters of award for the construction of several units of single and double storey bungalows whereby the defendant was appointed as the main contractor by the individual owners to build their houses in a project known as 'Proposed Mixed Development at Bandar Akademia, Mukim Lenggeng, Daerah Seremban, Negeri Sembilan Darul Khusus' ('the said project') as listed below:

(a) letter of award dated 20 April 2018 ('LA1') a contract for construction of 28 units of single and double storey bungalows (Batch 6, 9, 11, 12, 13, 14, 15, 16 TTB5 — Mixed 3) for a lump sum of RM2,953,657.75;

(b) letter of award dated 4 September 2018 ('LA2') a contract for construction of six units of single and double storey bungalows (Batch 10, 14, 15, 16) for a lump sum of RM689,744.50;

(c) letter of award dated 13 August 2019 ('LA3') for the construction of eight units of single and double storey bungalows (TTB3, TTB5) ('the said LA3 bungalows') for a lump sum of RM1,060,610.75; and

(d) letter of award dated 13 August 2019 ('LA4') a contract for the construction of ten units of single and double storey bungalows (Batch 12, 13, 14, 16) ('the said LA4 bungalows') for a lump sum of RM1,029,817.75.

[4] The contract period of the respective construction is as follows:

(a) LA1 — from 2 May 2018 till 1 May 2019;

(b) LA2 — from 4 September 2018 till 3 September 2019;

(c) LA3 — from 13 August 2019 till 12 August 2020; and

(d) LA4 — from 13 August 2019 till 12 August 2020.

THE PLAINTIFF'S CASE

[5] Pursuant to cl 6.0 — mode of payment of LA1, LA2, LA3 and LA4, the payment term shall be 30 days from the date of monthly progress claims.

[6] The plaintiff had issued progressive claims to the defendant in relation to LA1, LA2, LA3 and LA4 and the defendant had made part payments towards each of the progressive claims made by the plaintiff as follows:

(a) LA1

Progress claim No	Date of progress claims	Claims for works done (RM)	Retention sum (RM)	Progress claims (net) (RM)	Payment received from MSSB (RM)	Date of payment received from MSSB (RM)	Out-standing sum (RM)
1.	30 June 2018	974, 449.85	97, 444.98	877, 004.86	100,000	19 April 2019	-777, 004.86
2.	31 August 2018	511, 112.07	50, 237.91	460, 874.16	100,000	26 April 2019	-360, 874.16
3.	30 September 2018	649, 127.23	–	649, 127.23	100,000	3 May 2019	-549, 127.23

Progress claim No	Date of progress claims	Claims for works done (RM)	Retention sum (RM)	Progress claims (net) (RM)	Payment received from MSSB (RM)	Date of payment received from MSSB (RM)	Out-standing sum (RM)
4.	31 October 2018	248, 336.16	9,800	258, 136.16	70,000	29 May 2019	-188, 136.16
5.	30 November 2018	175, 689.56	–	175, 689.56	50,000	7 June 2019	-125, 689.56
6.	31 December 2018	182, 142.89	–	182, 142.89	50,000	28 June 2019	-132, 142.89
7. (F)	31 March 2019	16, 800	–	16, 800	50,000	22 July 2019	33, 200
		Total net progress claim		2,619, 774.86	Total overdue payment		-2,099, 774.86

(b) LA2

Progress claim No	Date of progress claims	Claims for works done (RM)	Retention sum (RM)	Progress claims (net) (RM)	Payment received from MSSB (RM)	Date of payment received from MSSB (RM)	Out-standing sum (RM)
1.	31 October 2018	526, 411.25	34, 487.23	491, 924.02	–		-491, 924.02
2.	30 November 2018	113, 779.39	–	113, 779.39	–		-113, 779.39
3.	31 December 2018	20, 529.57	–	20, 529.57	–		-20, 529.57
4.	31 January 2019	1, 040.74	–	1,040.74	–		-1,040.74
5.	28 February 2019	712.17	–	712.17	–		-712.17

Progress claim No	Date of progress claims	Claims for works done (RM)	Retention sum (RM)	Progress claims (net) (RM)	Payment received from MSSB (RM)	Date of payment received from MSSB (RM)	Out-standing sum (RM)
6. (F)	29 March 2019	27, 271.40	–	27, 271.40	–		-27, 271.40
		Total net progress claim		655, 257.29	Total overdue payment		-655, 257.29

(c) LA3

Progress claim No	Date of progress claims	Claims for works done (RM)	Retention sum (RM)	Progress claims (net) (RM)	Payment received from MSSB (RM)	Date of payment received from MSSB (RM)	Out-standing sum (RM)
1.	31 August 2019	46, 536.79	4, 653.68	41, 883.11	41, 883.11	3 December 2019	–
2.	30 November 2019	25, 241.67	2, 524.17	22, 717.50	22, 717.50	17 January 2020	–
3.	31 December 2019	64, 107.42	6, 410.74	57, 696.68	–		57, 696.68
4.	31 January 2020	55, 595.42	5, 559.54	50, 035.88	–		10, 035.88
5.	29 February 2020	65, 411.87	6, 541.19	58, 870.68	–		58, 870.681
		Total net progress claim		231, 203.85	Total overdue payment		166, 603.24

(d) LA4

Progress claim No	Date of progress claims	Claims for works done (RM)	Retention sum (RM)	Progress claims (net) (RM)	Payment received from MSSB (RM)	Date of payment received from MSSB (RM)	Out-standing sum (RM)
1.	31 August 2019	56, 467.07	5,646.71	50, 820.36	50, 820.36	3 December 2019	–
2.	30 November 2019	52, 010.96	5,201.10	46, 809.86	46, 809.86	17 January 2020	–
3.	31 December 2019	37, 568.88	3,756.89	33, 811.99	–		33, 811.99
4.	31 January 2020	47, 530.91	4,753.09	42, 777.82	–		42, 777.82
5.	29 February 2020	21, 196.83	2,119.68	19, 077.15	–		19, 077.15
		Total net progress claim		193, 297.18	Total overdue payment		95, 666.96

[7] The plaintiff had sent to the defendant notices for payment of the outstanding sums:

(a) LA1 — by letters dated 15 July 2020 and 4 August 2020 for the payment of the outstanding sum of RM1,049,774.86;

(b) LA2 — by letters dated 15 July 2020 and 4 August 2020 for payment of the outstanding sum of RM655,257.29;

(c) LA3 — by letters dated 19 June 2020 and 1 July 2020 for payment of the outstanding sum of RM166,603.24; and

(d) LA4 — by letters dated 19 June 2020, 1 July 2020 and 15 July 2020 for payment of the outstanding sum of RM95,666.96.

[8] In respect of the units within LA1 and LA2, the certificate of completion and compliance ('CCC') have been issued and in respect of the units within LA3 and LA4, the houses were at various stages of construction but not completed.

[9] The construction of units within LA3 and LA4 were not able to be completed by the plaintiff because of the stop order from the local authority (Majlis Perbandaran Seremban) due to the Movement Control Order ('MCO') issued during the Covid-19 pandemic commencing from 18 March 2020 till 31 December 2021.

[10] There was delay in issuance of the CCC due to the delay in the completion of the external infrastructure works by Bandar Akademia being the developer of the project. As such, there was no delay on the part of the plaintiff so far as to the completion of the works for LA1 and LA2 as the last progressive claims made for both these LAs were before the expiry of the completion date stipulated in the said LAs ie 1 May 2019 and 3 September 2019 respectively:

(a) LA1, the last progressive claim was made on 31 March 2019; and

(b) LA2, the last progressive claim was made on 29 March 2019.

[11] As for LA3 and LA4, due to the stop work order during the MCO and the subsequent engagement of the third party sub-contractor by the defendant, the plaintiff was not able to continue to complete the works. Hence, the claim made was only till the works done prior to the stop order.

[12] For LA3, the plaintiff agree to withdraw items six and seven of its claims made in its progressive claim amounting RM13,370.36. As such the plaintiff's claim for LA3 has been reduced to RM153,232.88.

[13] Since the defendant had failed to pay the plaintiff the outstanding sums based on the respective letter of award and the progressive claims, the plaintiff filed an action against the defendant via this writ and prays as follows:

(a) the sum of RM1,953,931.99;

(b) interest thereon at 5%pa from 1 July 2020 till the date of full realization;

(c) costs thereon; and

(d) such further and other reliefs the court deems just.

THE DEFENDANT'S CASE

[14] Clause 6.0 in LA1, LA2, LA3 and LA4 was amended and superseded from the beginning that there will be no interim assessment of the plaintiff's works and that there will be an inspection of the works carried out after the issuance of the CCC. In the meantime, the plaintiff will be paid a fixed sum of RM50,000 per month and subsequently RM100,000 per month.

[15] Therefore, the mode of payment as stated at cl 6.0 of each letter of award is no longer applicable.

[16] Consequentially, payments were made to the plaintiff upon issuance of the progressive claims by the plaintiff as initial payments in accordance to the letter of award as pleaded by the plaintiff in its statement of case.

[17] It is not disputed by the defendant that the plaintiff issued progressive claims:

(a) Nos 1 to 7 for sums totalling RM2,619,774.86 in relation to LA1 claiming to have completed 100% of the works thereunder; and

(b) Nos 1 to 5 for sums totalling RM655,227.29 in relation to LA2 claiming to have completed 100% of the works thereunder.

[18] It is also not disputed that the works under LA1 and LA2 have been substantially performed and the quantum of these claims is also not disputed, subject however to any cross claim on damages.

[19] The defendant has a counterclaim for damages arising from defects found in the houses constructed by the plaintiff under LA1, LA2, LA3 and LA4.

[20] It is the defendant's contention that the plaintiff has claimed for works that were not done in the progressive claims No 1–5 under LA3 and LA4 as shown below:

(a) LA3 — in progress claim No 5:

Item of claim (progress claim No 5)	Amount (RM)	Justification by SD3 why work not done (QA11, WSSD3)
Item 7 roof trusses in respect of PT 3965	3,449,19	The roof truss was not built according to the specifications and as a result the entire work was useless. The defendant had to reinstall the same.
Item 5, 6 and 7 that the first floor slab, first floor column and roof beam in respect of PT 3045	27,385.18 5,685.18 7,685.18	As regards the house to be erected on PT 3045, there is a claim at this is untrue as can be seen from the plaintiff's own photograph corresponding with claim No 5 at (273, B3) (second photograph). In respect of the first floor column and the roof beam, the claim was then withdrawn (we set out below the narrative in the notes of proceedings).

Item of claim (progress claim No 5)	Amount (RM)	Justification by SD3 why work not done (QA11, WSSD3)
Item 8 (p 256, B3) roof finishes in respect of PT 3965	4,923.79	As can be seen from the plaintiff's own photograph at (274, B3), the ridges were not completed. This caused rain water to enter the roof and cause damage to the underlying sisalation. The sisalation had to be replaced by the defendant. The defendant's work was undertaken in July, 2021.
Item 8 (p 258, B3) roof finishes in respect of PT 2197	4,348,79	Again, the ridges were not installed resulting in damage to the sisalation. The defendant's rectification work can be seen at (4, B8). The roof tiles were also not installed properly and some tiles were broken.
Items 15 and 16 (p 256, B3) door and window frames in respect of PT 3965	1,447.45 2,557.83	This is not true as can be seen at the plaintiff's own photograph as at claim No 5 at (274, B3). I refer again to photograph No 3. Again, the defendant completed this and the photographs of the work done is at.
Total:	57,482.59	

(b) LA4 — progressive claim No 5:

Item of claim (progress claim No 5)	Amount (RM)	Justification by SD3 why work not done (QA11, WSSD3)
Item 7 (p 380, B4) roof trusses in respect of PT 5750 and PT 5705	4,402.16 4,402.16	The roof truss was not built according to the specifications and as a result the entire work was useless. The defendant had to reinstall the same. The defendant's again had to engage a third party contractor to complete the works and these works can be seen at (7–8, B4).
Item 5, roof beam in respect of PT 7725 (381, B4).	2,870.28	However, there were two missing beams as can be seen at the third photograph at (9, B8) and there were defects in the brickworks which can be seen from the first two photographs at the same page. The defendant had to install the beams and for the brickworks, break down and re-lay the entire wall. Proof of the work done is at (10–11, B8).

Item of claim (progress claim No 5)	Amount (RM)	Justification by SD3 why work not done (QA11, WSSD3)
Refuse chamber door (p 372, B4) in respect of PT 7986		The refuse chamber door was never installed. This is illogical as from the percentages in the top part of the page no work on the house had even been commenced. As of 8 July 2020, the lot remained empty (258, B8) (first photograph).
Total:	11,674.46	

[21] Based on the defendant's pleadings, the defendant's contention is that the defects on the houses constructed by the plaintiff were discovered around January 2020 and that these were serious defaults of LA1, LA2, LA3 and LA4. Especially the defects were such defects which were due to the plaintiff's failure to construct the house in accordance to:

(a) architect's building specification;

(b) drawings;

(c) the finishes sample selections;

(d) building plan; and

(e) all directions given by the defendant.

[22] It is the defendant's contention that due to the contract being a lump sum contract, the plaintiff is not entitled to payments until the defects are rectified but in any case, the plaintiff cannot rely on the progressive claims to receive its payment but on the basis of quantum meruit.

[23] It is the defendant's contention that the plaintiff had continuously failed, refused and was negligent in making the rectifications mentioned via emails and letters by the defendant.

[24] The defendant pleaded that the cost to rectify the defects/defaults was RM432,171.32 and that it will increase after a full inspection by the defendant which the defendant had not been able to do as the plaintiff did not cooperate by attending the inspection.

DEFENDANT'S COUNTERCLAIM

[25] Due to the defects, the defendant contents that the certificate of practical completion ('CPC') issued to be cancelled and declared not valid.

[26] The defendant claims for damages amounting to RM432,171.32 being the rectification cost for the defects/defaults already identified and claims for damages for any future defects/defaults which may be discovered (latent defects).

[27] The defendant is entitled to claim for liquidated ascertained damages ('LAD') amounting RM783,200 calculated till 5 November 2020 and will continue till the CPC for all the units are issued or in the alternative any other sum duly assessed.

[28] The defendant prays as follows in its defence and counterclaim:

(a) Suatu Perintah bahawa Sijil-Sijil Pelengkapan Praktikal berhormat dengan 16 unit yang merupakan perkara subjek Surat Awad Pertama dan 3 unit yang merupakan perkara subjek Surat Awad Pertama adalah dan dengan ini dibatalkan dan diketepikan;

(b) Suatu deklarasi diberikan bahawa Sijil-Sijil Pelengkapan Praktikal tersebut adalah batal dan tidak sah dari tarikh ianya dikeluarkan;

(c) Plaintif hendaklah membayar Defendan sejumlah sebanyak RM432,171.32 berupa kos membaiki Pengingkaran-Pengingkaran seperti yang diplidkan didalam Pernyataan Tuntutan;

(d) Plaintif hendaklah membayar Defendan sejumlah sebanyak RM783,200.00 dikira setakat 5-11-2020 sebagai ganti rugi jumlah tertentu;

(e) Plaintif hendaklah membayar Defendan sejumlah sebanyak RM40.00 sehari untuk setiap unit (kesemuanya ada 53 unit) dikira dari 6-11-2020 hingga Sijil-Sijil Pelengkapan Praktikal berhormat dengan unit-unit yang dibina oleh Plaintif dikeluarkan;

(f) Plaintif hendaklah mengindemnifikasikan Defendan terhadap kesemua tuntutan untuk gantirugi jumlah tertentu dan kesemua tuntutan berhormat dengan kegagalan menuruti dengan Surat-Surat Awad yang dikeluarkan oleh Defendan kepada Plaintif oleh pihak-pihak kepada Perjanjian Perjanjian Pembinaan yang diplidkan dalam Tuntutan Balas selain Defendan; jumlah yang perlu ditentukan diatas ditentukan secara muktamad;

(g) Ganti rugi am untuk pengingkaran kontrak dan kecuaian;

(h) Faedah pada kadar 5% atas apa jua jumlah yang diberikan diatas dikira dari tarikh tuntutan balas disini;

(i) Kos;

(j) Apa jua atau lain relif diberikan sebagaimana yang Mahkamah yang Mulia ini menganggap wajar dan suai manfaat diberikan.

ISSUES

[29] Issues which have to be considered by this court arising from both parties are as follows:

(a) whether cl 6.0 of the LA1, LA2, LA3 and LA4 is applicable;

(b) whether the plaintiff had completed the works under LA1, LA2, LA3 and LA4;

(c) whether there were issuance of CPC and CCC;

(d) whether the plaintiff had failed to rectify the defects; and

(e) whether there was LAD to be claimed by the defendant.

FINDINGS OF THE COURT

Whether cl 6.0 of the LA1, LA2, LA3 and LA4 is applicable?

[30] Clause 6.0 of the letter of award reads as follows:

> 6.0 Mode of Payment
>
> The payment term shall be 30 days from the date of monthly progress claim.

[31] Pursuant to this clause, the plaintiff had issued progressive claims to the defendant but the defendant had not paid the plaintiff the sum claimed but had instead issued partial payments to the plaintiff.

[32] There is no dispute to the fact that the contract is a lump sum contract, as such, there is no dispute as to the contract sum as it is a fixed sum. As to the mode of payment, between the plaintiff and the defendant, the only document where the terms and conditions of engagement between them are those found in the letter of award ie LA1, LA2, LA3 and LA4.

[33] Although the defendant had in its pleadings stated that there is an amendment to the mode of payment which supersedes the existing cl 6.0, there was no evidence of the same produced to this court. Based on the purported amendment to the mode of payment, a sum of RM50,000 per month and subsequently RM100,000 per month will be paid to the plaintiff pending an inspection to be carried out after the issuance of CCC in order to pay the full contract sum to the plaintiff.

[34] Based on the evidence produced before this court, that was not the case. If there had been such an amendment to the mode of payment as claimed by the defendant, at the time the progressive claims were made by the plaintiff, it

would only be natural for the defendant to communicate to the plaintiff such an amendment and not make partial payments towards the progressive claims instead. There is also no evidence to show that the defendant had objected to the claims made by the plaintiff.

[35] The effects of the defendant's failure to reply to the demand made by the plaintiff has been explained by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 288; [1995] 4 CLJ 155 at p 159, as follows:

> During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant. In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at pp 479–487; [1986] 1 LNS 42:
>
> ...
>
> Now there are cases — business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.

[36] The defendant had submitted on this issue as follows:

> To summarise, with silence not being equivalent to consent to the contents of the Progress Claims and demands, then the fact that there was no response was merely of probative value as to the claims and demands, not complete proof. It remains the obligation of the Plaintiff to prove its underlying claim and it remains the right of the defendant to rebut such claims.

[37] Since it is the defendant's assertion that cl 6.0 had been amended and that the amended version supersedes the one in the letters of award, the burden to produce the amended version is on the defendant (s 106 of the Evidence Act 1950 ie when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him). Since no such evidence was produced to this court, the defendant had failed to discharge its burden so far as this assertion is concern.

[38] Therefore, on this issue, it is proven that cl 6.0 of the letter of award remains binding on the parties.

Whether the plaintiff had completed the works under LA1, LA2, LA3 and LA4?

A **[39]** On the admission of the defendant through its pleadings that CPC had been issued by the architect for LA1 and LA2, it has been established that the plaintiff had completed the works under LA1 and LA2. As for the works under LA3 and LA4, the plaintiff did not claim that it has completed the works.

B **[40]** The progressive claims made by the plaintiff for LA3 and LA4 are up to when they had to stop construction due to the stop work order issued due to the Movement Control Order ('MCO') in relation to Covid-19. It is the defendant's contention that the plaintiff had abandoned works under LA3 and LA4.

C

[41] The plaintiff had shown to the court that it had written to the defendant on 3 July 2020 informing the defendant of its requirement to stop work due to the MCO and for an extension of time but it did not receive any reply from the defendant. The defendant had not denied that there was no reply to the D plaintiff's request and by that time has been set large by the defendant. There is also no evidence to show that the defendant had written to the plaintiff instructing to resume work failing which the defendant will have no choice but to engage a third party contractor to complete the works under LA3 and LA4.

E

[42] It is an admitted fact that the defendant had engaged a third party contractor to complete the plaintiff's work under LAs 3 and 4 without giving any notice to the plaintiff.

F **[43]** Therefore, the defendant's contention that the plaintiff had abandoned works under LA3 and LA4 has not been established by the defendant.

[44] Since the contract is a lump sum contract, it was argued by the defendant that unless the works under LA3 and LA4 are completed, the G plaintiff is not entitled for the claims made. However, since it has been established that the plaintiff did not abandon its works for LA3 and LA4 and the only reason it could not continue its work was due to the stop work order, the plaintiff is entitled to receive for the work done ie on a quantum meruit basis.

H

[45] Since the plaintiff had already issued progress claims for the works done to the defendant, on the basis of quantum meruit, these progressive claims can be measured as sum owed by the defendant to the plaintiff for works done for LA3 and LA4.

I

Whether there was issuance of CPC and CCC?

[46] It is by the defendant's own admission in its pleadings that CPC had been issued by the architect for 16 units under LA1 and six units under LA2.

Although in the defendant's counterclaim against the plaintiff, the defendant had prayed among others for the cancellation of the CPC, however, the defendant had failed to produce the CPC to this court.

[47] Failure to produce the CPC had led the plaintiff to submit that the reason for the failure to produce the CPC is obviously due to fear that this would establish the physical completion of LA1 and LA2 and that this would render the accusation of non-completion of units in LA1 and LA2 to be untrue.

[48] Therefore, by the defendant's failure to produce the CPC, s 114(g) of the Evidence Act 1950 is invoked whereby it allows a presumption against the defendant that by the production of the CPC, it will be unfavourable to the defendant's case.

[49] As for the CCC, it has been admitted that CCC had been issued for units built under LA1 and LA2 by the defendant.

Whether the plaintiff had failed to rectify the defects?

[50] It is the defendant's contention that the plaintiff had failed to rectify the defects on the units under LA1 and LA2. The defendant had produced letters issued by the architect to the defendant on issues relating to defects on the units under LA1 and LA2 as evidence on the issue of defects in the common bundles marked as 'B6' and 'B8'.

[51] It is the contention of the defendant that the plaintiff had failed to rectify the defects and as such the defendant had to incur costs in rectifying those defects. However, it has been established that CCC had been issued for units under LA1 and LA2 and as such, by the issuance of CCC, it is proven that rectification had been done by the plaintiff. This was the evidence of the plaintiff's subpoena witness, Shaiful Arizal bin Arbaine ('SP2').

[52] According to SP2's testimony, who had given evidence as the Penolong Pegawai Seni Bina Bandaraya Seremban (formerly at Majlis Perbandaran Nilai, Negeri Sembilan) that before the local authority approved the issuance of CCC, consent will be obtained from TNB and Sykt Air Negeri Sembilan and that all relevant documentation for issuance of CCC had been issued properly by the architect for all the 34 units under LA1 and LA2. This was said during cross-examination of SP2:

> JS: Okay soalan saya setuju bahawa pihak Majlis tak kira MPN atau MBS tidak terlibat dengan penyeliaan ataupun pemantauan kerja-kerja pembaikan defects, setuju?

SP2: Sebelum tu saya nak tanya defect sebelum CCC atau selepas?

JS: Okay baik kita ambik sebelum CCC.

SP2: Jika sebelum CCC macam prosedur saya cakap tadi pihak Jabatan Majlis iaitu Pegawai Jabatan Pembangunan Bersama-sama Arkitek akan buat lawatan ke tapak untuk melihat keadaan rumah tersebut. Jika ada defects pihak Pemaju perlu membaiki terlebih dahulu sebelum pihak Majlis mengeluarkan sokongan CCC.

[53] The evidence given by an independent witness, SP2, confirms that the defects (if any) prior to the issuance of CCC were rectified prior to the issuance of the CCC.

[54] Furthermore, the defendant's allegations of defects for all units under LA1, LA2, LA3 and LA4 were very unclear. This is because, most, if not all of the defects alleged to be found in the units built by the plaintiff shown to this court were based on images ('photos') which were manually marked to correspond with the PT numbers related to the units which were to be built by the plaintiff. However, the defendant failed to establish the link between the photos and the units which was said to be built by the plaintiff.

[55] The photos which were submitted as evidence were photos which were not taken jointly during a joint inspection, therefore, there was no verification as to which units that the photos belong to. In fact, it was evidenced that the photos were taken by the third party contractor, Wyner Land Sdn Bhd, appointed later to complete the construction of the units under LA3 and LA4 which were initially under the plaintiff. This was confirmed by the defendant's witness, SD2 being the project manager of Wyner Land Sdn Bhd. The photos that did not carry digitalised dates marked on them as well, so there is no way to know when were they actually taken. I find these photos cannot be admissible pursuant to s 73A(6) of the Evidence Act 1950:

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

[56] The defendant had failed to give cogent, comprehensive and reliable evidence to prove to this court the existence of defects in the plaintiff's works and its failure to rectify the same. It is undeniable that the defendant had produced so many documents bearing many different PT numbers which mostly did not correspond to the PT numbers belonging to the units under LA1, LA2, LA3 or LA4. There were also so many correspondences which were

from the defendant addressed to Cempaka Johan Sdn Bhd and the plaintiff with no clear indications as to the units particularly given to the plaintiff to construct.

[57] Therefore, it has been proven that the defects on units under LA1 and LA2 (if any) had been rectified prior to the issuance of the CCC by the plaintiff and the defects (if any) on units under LA3 and LA4 were not informed to the plaintiff as soon as the stop work order was affected and no joint inspection was conducted prior to the engagement of Wyner Land Sdn Bhd to continue the plaintiff's work in order to identify any defects. Therefore, there is no evidence to show that there were defects on units under LA3 and LA4 prior to Wyner Land Sdn Bhd taking over the construction of the same.

[58] The defendant had attempted to show this court through the photos taken by the plaintiff which were attached to the progressive claims for LA3 and LA4 that there were claims made for works undone. However, these photos were so unclear that it was not possible to view the alleged undone work. Furthermore, there are no evidence whatsoever showing the defendant's objection or clarification or even request for a joint inspection to be done in order to verify the claims made against the work done.

Whether there was LAD to be claimed by the defendant?

[59] It has been established that for LA1 and LA2, the last progressive claims were made before the given completion date. As to the issuance of the CCC, it has also been established that the issuance of CCC was also based on the completion of external infrastructure works by Bandar Akademia being the developer of the project.

[60] However, it was pleaded by the defendant that the LAD is calculated till 5 November 2020 and will be ongoing till the CPC is issued. In such circumstances, although it was pleaded by the defendant that CPC had been issued but none was produced in this case. There is also no evidence to show that the defendant had issued a certificate of non-completion ('CNC') against the plaintiff for any of the LAs.

[61] As the burden to prove is on the defendant for its claim for LAD, the defendant had failed to discharge that burden.

MATTERS NOT PLEADED

[62] In this case, I find the defendant to be inconsistent consistent in its defence. Matters that were raised in the pleadings initially were later on changed in the submissions. For instance, the issue pertaining to CPC was only

raised in the pleadings but had not been spoken off or any evidence adduced to establish the issuance of CPC even though the defendant had prayed for the cancellation of the CPC in its counterclaim.

[63] The defendant had also raised a non-pleaded matter in its defence and counterclaim ie the issue of costs for rectification and completion of uncompleted works for LA3 and LA4. In the case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, the Federal Court had emphasised as follows:

> [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v Muniandy* [1986] 1 MLJ 490; [1985] 1 LNS 117 and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; [1989] 1 LNS 74). In *Blay v Pollard and Morris* [1930] 1 KB 628, Scrutton LJ ruled that: cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment.
>
> [30] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ 667; [1991] 1 CLJ Rep 239, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 CLJ 551 (FC)).
>
> [31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157; [1974] 1 LNS 178, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also: *Haji Mohamed Dom v Sakiman* [1956] 1 MLJ 45; [1955] 1 LNS 26 and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99; [1963] 1 LNS 59).

[64] In this case, I have considered all matters in accordance to the pleadings ie the defence and counterclaim filed by the defendant.

CONCLUSION

[65] In the upshot, I allowed the plaintiff claims and order as follows:

(a) the defendant pays the sum of RM1,953,931.99 to the plaintiff;

(b) interest at a rate of 5%pa on the sum of RM1,953,931.99 to be incurred by the defendant from 1 July 2020 until the date of full settlement;

(c) the defendant's counterclaim is dismissed with costs; and

(d) the defendant pays the plaintiff costs of RM50,000 for the claim and counterclaim subject to allocator's fees.

Plaintiff's claim allowed and defendant's counterclaim dismissed.

Reported by Ashok Kumar